Supreme Court, U.S.
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E. ROBERT SEAVER, CL...

No. 71-171

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

ESPANOLA LAKEY WHITFIELD, ET AL,

Petitioners,

v.

KLEIN INDEPENDENT SCHOOL DISTRICT, ET AL,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF CIVIL APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON, TEXAS

RESPONDENTS' BRIEF

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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RESPONDENTS' BRIEF

The Respondents pray that a Writ of Certiorari as prayed for by Petitioners herein be denied.

The Opinion of the Texas Court of Civil Appeals for the 14th Judicial District of Texas is reported at 463 S.W.2d 232, and is printed in the Appendix of Petitioners' Brief. The Supreme Court of Texas' refusal to grant Petitioners' Application for Writ of Error from the Court of Civil Appeals for the 14th Supreme Judicial District of Texas, at Houston, Texas, is reported at 463 S.W. 2d 232.

JURISDICTION

Your Respondents herein maintain and respectfully submit to this Court that this Court does not have jurisdiction of this cause for the reason that Petitioners did not assert their claim of deprivation of a Constitutional right at the proper time and in the proper manner. In this regard, Petitioners did not present any Federal or Constitutional question or claim to the Trial Tribunal by pleadings, by presentation during the trial of said cause, or by Petitioners' Motion for a new trial. Even though this case had been pending before the Trial Court for a period of five years, Petitioners' first attempt to interject a Constitutional or Federal question was made after the case had been presented to the Appellate Court. Such a presentation of a new issue or claim for the first time on appeal is precluded under the laws and rules of practice of the State of Texas.

QUESTIONS PRESENTED FOR REVIEW

(1) The question presented which is set forth in the paragraph of Respondents' Brief entitled "Jurisdiction", is the jurisdictional question that deals with untimely and improper presentation of Federal questions in State Courts. In this regard, the Respondents maintain that such untimely and improper presentation of any such Federal question or United States Constitutional question precludes Petitioners from obtaining a Writ of Certiorari to the Court of Civil Appeals of the State of Texas in this case.

(2) In response to the second question presented by Petitioners in their Brief on the questions presented, Respondents state that there is no established procedure of the State of Texas, nor did the State of Texas establish any procedures wherein the Petitioners' private property may

be or was taken for private use in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

(3) The Respondents herein cannot agree that the questions presented by Petitioners are in reality questions that can be presented in this case. The Petitioners state in the opening paragraph under the heading "Questions Presented" in their Brief, that the land in question was simultaneously converted to the private use of school officials. This statement is not true as the record reflects this land was conveyed to a school official some considerable time after the conveyance of said real property by the Petitioners to the Respondents herein. The conveyance from the Petitioners to the Respondents herein was a simple conveyance of land for consideration received and was in no manner tantamount to, or resembling in any manner the procedures of eminent domain. Respondents further state that in this instance there was no taking of property by state agencies for purely private use. Although this is a question presented, it has no merit and Petitioners consequently were not denied any rights guaranteed by due process of the law under the Fourteenth Amendment.

STATEMENT OF THE CASE

Respondents do not agree with the presentation made by the Petitioners in their statement of the case and therefore will restate the case, but before doing so feels that it is imperative that certain erroneous statements and misrepresentations made in Petitioners' Brief be pointed out. Respondents are not concerned in determining, in the language of Petitioners, whether these statements are made ingeniously or ingenuously but calls such statements to the attention of the Court for the purpose of assuring that the presentation of this case to the Court is correct. The

statement made by Petitioners herein in their Brief under the heading of "Constitution and Statutory Provisions Involved" (Petitioners' Brief, p. 3), whereby they state that this case also involves eminent domain procedure as provided by the Statutes of the State of Texas, is untrue and was never a part of this case at any time from its inception in the Trial Court to and through the Appellate Courts. Further, the Petitioners state in their Statement (Petitioners' Brief, p. 4) that the Petitioners, both in person and by letters, on numerous occasions were informed that unless this land was voluntarily sold for the purposes of constructing a school it would be condemned. The statement is definitely not true, in fact, the Petitioners were only contacted two or four times at the most by any of the agents of the school district and this was only by three agents of the Klein Independent School District over a period of more than two years. (S.F. pp. 35, 83, 84, 167, 236) Petitioners state (Petitioners' Brief, p. 4) that one of the Petitioners stated on direct examination on the trial of this cause in the Trial Court that the term "condemn" to her meant that the land would be taken and they, the Petitioners herein, would receive no consideration since it would be acquired for the construction of a public school. It is strange that the Petitioners would refer to this particular statement in that it was grounds for impeachment of the witness during the Trial. (S.F. pp. 239-242) This portion of the Statement of Facts clearly shows that the Petitioner in question at one time stated that condemned to her meant that she would receive money for the land if it was condemned and then at another time during the trial of the case, she stated that condemned to her at no time carried that connotation but meant that the land would be taken from her without any compensation. Petitioners further state that prior to the time Petitioners' land was acquired by the Respondents, this land was stated to be

in excess of what was required by the school (Petitioners' Brief p. 5). This is not an accurate statement in that prior to the time that Petitioners' land was acquired, certain other land was stated to be in excess of what was required by the school. Tract 5 which Petitioners sold to Respondents at the time of the purchase was to be used for a teacherage and at that time was thought needed for the school for the purpose of constructing a school teacherage which is a purpose authorized by the Statutes of the State of Texas. (S.F. p. 54) The Petitioners also state in their Brief on page 5 that "on trial of the cause, the jury found against Petitioners on all issues except fraud." This statement is clearly a misrepresentation because at no time, in answer to the Special Issues submitted to the jury, was fraud even mentioned and the jury specifically found that there were no misrepresentations made by Respondents. (Please see judgment of the Court for the Special Issues submitted in this respect in the transcript file in this case with the Court). The Petitioners in their Brief, state that Petitioners in their appeal to the Texas Court of Civil Appeals sought to reverse the Judgment of the District Court on the ground that the Judgment was void since it permitted the taking of private property for private use and was consequently void as a matter of law under the Due Process Clause of the Fourteenth Amendment. The Petitioners then add: "The Court of Civil Appeals rejected this contention and affirmed the Judgment of the Trial Court". There is no indication in the Opinion handed down by the Texas Court of Civil Appeals that the question of due process was ever considered by such Appellate Court as it applied to the taking of private property for private use by a governmental agency or entity. The Court in no way ruled on this question. The question was pretermitted obviously because improperly and untimely presented. (Petitioners'

Brief, pp. 6-7). Further, Petitioners state as follows: "In the petition to the District Court of Harris County seeking to set aside and vacate the conveyance of the Petitioners, that Petitioners sought the restitution of their property on the grounds that it had been fraudulently taken under the guise of public use and converted to private use in violation of the Federal Constitution". (Petitioners' Brief, p. 6). This statement is patently false as the petition of Petitioners filed in the District Court presented no Constitutional or Federal question as it related to restitution of the property in question as sought by the Petitioners here or as it may have related to any other matter. An examination of the pleadings (See Transcript of Petitioners filed in the District Court) make this very clear. On page 7 of the Brief of Petitioners, Petitioners further state that following an extensive trial in the District Court, the jury found against Petitioners on all issues except fraud. This statement was previously referred to and commented upon by Respondents in their Brief (Supra p. 5).

The following is Respondents' Statement of the Case. Respondents have sincerely endeavored to make the following recapitulation of the case accurate and succinct.

This is a suit brought by the Petitioners (Plaintiffs in the Trial Court, and Appellants in the Court of Civil Appeals) asking for damages and petitioning the Trial Court to rescind and set aside a conveyance of a particular tract, Tract No. 5, of unimproved real property made by the Petitioners to the Respondents on September 2, 1962. The Petitioners' ground for rescission and damages are alleged misrepresentations made by the Respondents to the Petitioners to induce the Petitioners to make the conveyance of said Tract 5 to the Respondents. This cause of action proceeded to trial on Petitioners' Second Amended Petition wherein the Petitioners allege that said Petitioners re-

fused to sell or convey said tract of land to the Respondents and that consequently the Petitioners were threatened, harassed and badgered by the Respondents and others and that thereafter the Petitioners were forced by the Respondents to sell said land under threat of condemnation. Petitioners further contend in their pleadings that the Respondents made representations that were false, with the intent to deceive and defraud Petitioners for the purpose of inducing Petitioners to act. Although the Petitioners' petition sets forth Tracts 3, 4 and 5 as the property conveyed by the Petitioners to the Respondents, this allegation is untrue as only Tract 5 was actually conveyed to the Respondents by Petitioners. In the early part of 1960, the School Board of Klein Independent School District made a decision to buy twelve (12) adjacent tracts of land located within the Klein Independent School District, upon which a new public High School, a football stadium and other buildings and schools were to be constructed. The dimensions of each of said twelve (12) tracts of land are approximately 260 feet wide and 2100 feet long. All twelve said tracts are adjacent to each other and together basically form a rectangular piece of real property comprising approximately one hundred (100) acres of land with over all dimensions, more or less, of 2100 feet by 2000 feet. The tracts are numbered consecutively from Tract 1 at one end to Tract 12 at the other end of the total area. After the Board of said Independent School District had made the decision to buy the said twelve tracts of real property, the Board commenced a program of buying all said tracts from various owners. To facilitate the acquisition of the various tracts at a reasonable market value, the Board obtained the services of Miss Marjorie Chitwood, a Realtor, who resided within the boundaries of the Klein Independent School District, to purchase the twelve tracts of land as

trustee for said Board. All said tracts of real property had clouds on the title at the time this program of acquisition of land was instituted by the Klein Independent School District. As a result of the negotiations with the various land owners, who were quite numerous, and the necessary work to attempt to clear the titles to said property, the program for acquiring said land became quite tedious and protracted. In fact, it was over two (2) years before the last tract to be purchased, Tract 5, was acquired by the Klein Independent School District. This Tract was acquired and the deed from the Petitioners herein to the Respondents was executed on September 8, 1962. Respondents only acquired the eleven tracts that were Tract 2 through 12. All of these tracts of real property that were acquired by the Respondents were by conveyances from the various owners of said tracts. None of these tracts were acquired by the Respondents by means of condemnation proceedings. Shortly after the conveyance of Tracts 3 and 4 by the respective owners to the Klein Independent School District, in August 1962, these two tracts were conveyed to Miss Marjorie Citwood who subsequently sold said tract to Mr. R. E. Lyon, the School Superintendent. This conveyance of Tracts 3 and 4 to Mr. R. E. Lyon was consummated prior to the conveyance of Tract 5 to the Klein Independent School District by the Petitioners, which occurred on September 8, 1962. The reason the School Board conveyed said Tracts 3 and 4 to Miss Majorie Chitwood was that the School Board made changes of plans regarding the property that was to be used for the school, and that the School Board became cognizant of an unanticipated increase in cost due to an imminent high bid on the construction of the school, the school stadium, other auxiliary buildings and supplementary areas of property. The School Board proceeded with the purchase of Tract 5 from the Petitioners on September 8, 1962, for the purpose, at that

time, of constructing a teacherage on such property. Tract 5 comprises approximately 7.8 acres of land and the consideration paid by the Respondents for said tract of land to the Petitioners was approximately $722.00 per acre. Tract 5 is located between Tracts 4 and 6, and on May 10, 1963, was sold to Mr. R. E. Lyon. The remaining seven (7) tracts, 6 through 12, were eventually used for the construction of a football stadium, a public school, various auxiliary buildings and supplementary areas for the school.

Pursuant to the trial of this case in the Trial Court, Special Issues were presented to the jury and upon the answering of said Special Issues a take nothing judgment was entered by the Court denying the relief sought by the Petitioners.

Petitioners then perfected their appeal to the Texas Court of Civil Appeals, at which time Petitioners first interjected Federal and/or Constitutional questions.

ARGUMENT

Jurisdiction

Your Respondents herein maintain and respectfully submit to the Honorable Court that this Honorable Court does not have jurisdiction of this cause. Petitioners herein maintain that jurisdiction of this Court is evoked pursuant to 28 U. S. Code 1257 (2) and (3).

Respondents cannot agree with this contention of Petitioners and therefore take the position that Petitioners herein have no standing before this Court to obtain a Writ of Certiorari to the Civil Court of Appeals of Texas in this case. Petitioners herein, as Plaintiffs, filed this cause of action in the Trial Court, the 133rd District Court of Harris County, Texas, on the 26th day of March, A.D. 1965

and final trial began on the 18th day of May A.D. 1970. The Petitioners, in their pleadings filed in said Trial Court, petitioned said Court for relief upon the sole ground of fraud. The relief sought by Petitioners in this case was rescission of a deed and damages based upon a conveyance by the Petitioners herein to the Respondents herein, which was induced by fraudulent representations of the Respondents. The pleadings of the Petitioners in the Trial Court in no way alluded to nor were they predicated upon any provisions of the United States Constitution or any Federal questions. Petitioners herein amended their petition a number of times during the years that this case was pending before the Trial Court. At no time, as a result of said amendments, were any matters pleaded that presented a Federal or Constitutional question. As the State of Texas employs the Special Issue System, Special Issues were submitted to the jury in the Trial Court in this case. Special Issues Nos. 2, 6 and 10 were determinative upon the falsity of the representations made by agents of the Respondents herein. Petitioners are evidently relying upon the answer to Special Issues Nos. 13, 14 and 15 as the basis for asserting a Constitutional or Federal question in this case. Special Issues Nos. 13, 14 and 15 and answers are as follows:

SPECIAL ISSUE NO. 13

Do you find from the preponderance of the evidence that at the time Tract 5 was conveyed by Plaintiffs to the Klein Independent School District, it was not the intent of the school district to use said land for school purposes?

Answer "We do" or "We do not".
To which the jury answered: "We do".

SPECIAL ISSUE NO. 14

Do you find from a preponderance of the evidence that after Tract 5 was conveyed by Plaintiffs to the Klein Independent School District, it was thereafter conveyed to Mr. R. E. Lyon for other than school purposes?

Answer "We do" or "We do not".

To which the jury answered: "We do".

SPECIAL ISSUE NO. 15

Do you find from a preponderance of the evidence that Tract 5 was not used for school purposes at any time after it was conveyed by Plaintiffs to the Klein Independent School District?

Answer "We do" or "We do not".

To which the jury answered: "We do":

The Court, out of a sense of fairness, obviously presented Special Issues Nos. 13, 14 and 15 to provide the jury with a basis for validly inferring from the premise that if the Respondents did not intend to use the land in question at the time it was purchased by the Respondents herein for "school purposes", then the statement that the land would be used for "school purposes" made at a time prior to said purchase was a misrepresentation when made. Although the jury was given the opportunity or frame work for making such an inference, it declined to do so. It may be added that this refusal by the jury to make such a deduction was in no way a diriment impediment to the rendition of a sound judgment in this case. It should be stated at this point that "school purposes", which term carried with it the meaning of the building of a school at the trial of said cause (S.F. pp. 10, 57, 76), does not constitute the only lawful purpose for which an independent school district may purchase land in the State of Texas. One of the witnesses for the

school district stated, without any countervailing evidence, that at the time of the purchase of said land, it was purchased for the express purpose of constructing a teacherage on said property (S.F., p. 54). Purchases of land for such a use is fully authorized by the Laws of the State of Texas, Article 2797 Tex. V.A.C.S. The jury did not conclude, and rightfully so, that the proposition established by the affirmation of Specials Issues No. 1, No. 5 and No. 9, and the proposition established by the affirmation of Special Issue No. 13, were necessarily disjunctive. It must be noted that although Special Issue No. 13 established that the land in question was not bought for school purposes, the connotation of "school purposes" in this instance does not exhause the legal purposes for which an independent school district can purchase land in the State of Texas. And it should further be observed that "school purposes" is not synonymous with "public use" which Petitioners are attempting to assert on page 9 of their Brief. There, Petitioners state as follows: "Under these circumstances the conclusion appears inescapable that the Plaintiffs' land was not required for any public use at the date of its acquisition — indeed this jury so found". The latter part of this statement, "indeed this jury so found" is an outright misrepresentation of the findings of the jury. The jury at no time found that such land was not to be used for any public use, it only found that this land was not to be used for any school purposes as that term was construed and applied at the trial of this cause in the Trial Court (See Special Issues p. 12 this Brief).

Although the practice in Texas for amending one's petition is very loose and liberal, Petitioners at no time prior to the time of the trial of said cause in said Trial Court amended or attempted to amend their petition to include any Constitutional or Federal question. Petitioners pro-

ceeded to trial strictly on the question of fraud allegedly perpetrated upon Petitioners. Under the practice in the State of Texas, from almost the beginning of the time that Texas became a political entity, it has been the rule that a new theory or new basis for recovery or for maintaining Plaintiff's action cannot be first presented with efficacy for the first time before an Appellate Court. This rule of long standing in the State of Texas of course, is based upon a rationale that provides for the just and orderly disposition of cases in the Court of this State. The Rule in Texas, prior to adoption of Rule 67 of the Texas Rules of Civil Procedure, required all theories of recovery or all the grounds upon which a cause of action is predicated to be pleaded prior to the trial of the case. The probata had to conform to or be compatible with the allegata and judgment could not be entered by the Court that extended beyond the relief set forth in the pleadings. Rule 67 reads as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necesary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of special issues, as is provided in Rules 277 and 279.

This new rule relaxed the old rule somewhat and made it possible for the Court to go beyond the pleadings of either party when any question or matter was by expressed or implied consent of the parties tried before the tribunal. Where such expressed or implied consent is given, either

party may then, by trial amendment, so alter his pleadings to encompass the new grounds for relief or new matter. Judgment then could be entered, based upon the new matter in accordance with the findings of the Court or the jury. Once the new basis or theory of the cause of action had been litigated, it then became too late for the party opposing the introduction of such new matter to object as he is considered to have waived this right. It is clear from an examination of the pleadings of Plaintiffs on which this case went to trial, the charges of the Court to the jury and the Petitioners' Motion for New Trial, that there were no Federal or Constitutional questions before the Trial Court in any form, whether it be by express consent, implied consent and waiver or otherwise. The first time that Petitioners herein alluded to or referred to any United States Constitutional matter or Federal questions was in their appeal to the Court of Civil Appeals of the 14th Supreme Judicial District of Texas. As this matter had not been presented to the Trial Court below in accordance with the rules of Texas, the Appellate Court was without power to consider new matters introduced for the first time on appeal to that Court, and, consequently, did not consider these extraneous matters that were not litigated in the lower Court. In this regard, it should be pointed out, also, that the cause of action asserted by Petitioners in the Trial Court was not based upon any action of Respondents asserted under the color of any state statute regarding the purchase of land. One must bear in mind that this is not a question pertaining to the process of eminent domain but a conveyance directly from Petitioners to Respondents by a deed of the land in question.

The said Court of Civil Appeals in Texas did not rule on the Constitutional question advanced at that stage by Petitioners herein and, as the Supreme Court of Texas

refused Petitioners' Application for Writ of Error to that Court, it must be assumed that the Court also did not consider the Federal or Constitutional question first presented on appeal. This Court has repeatedly held and we must conclude that it is now settled law that any claim relied upon by any litigant in a lawsuit must be asserted at the proper time and in the proper manner by pleadings, motion or other appropriate action under the State system of pleading and practice. In reference to the question as to whether or not such a claim had been so asserted, the decision of the State Court is binding upon this Court when it is clear that such decision is not rendered as an artifice, stratagem or ruse for the purpose of defeating the claim of the Federal or Constitutional right. This cause of action was pending for approximately (5) five years prior to the trial of said cause on its merits in the Trial Court. Although Petitioners did amend their petition a number of times during the pendency of this suit prior to said trial, they did not choose to incorporate by amendment any Federal question or Constitutional question. Subsequent to the judgment of the Trial Court denying the Petitioners relief, Petitioners filed a Motion for a New Trial in which no mention was made of any Federal question or Constitutional question.

For the rule in the State of Texas regarding new issues and new theories of recovery introduced for the first time upon appeal, see the following cases:

A. L. Wolff & Co. v. *Missouri, K & T Co.*, 289 S.W., 1000 (Com. of Appeals);

Ayoub v. *Herold*, 286 S.W. 2d, 539, reh den, err. ref. n.r.e. (Civil Appeals);

Boatner v. *Providence-Washington Ins. Co.*, 241 S.W., 136 (Com. of Appeals);

Brown v. *Searls*, 228 S.W., 173 (Com. of Appeals);

Freeman v. *Federal Underwriters Exchange*, 155 S.W. 2d, 674 (Civil Appeals).

It is quite clear from these cases that interdiction of such a practice is strongly upheld by the Texas Courts.

For the prior holdings of this Court regarding the effect of improper and untimely presentation of claims in the State Courts upon a petition for certiorari or appeal to this Court see:

Atlantic Coast Line R. Co. v. *Mims*, 242 U.S. 232, 37 S.Ct. 188, 61 L. Ed. 476;

Barbour v. *Georgia*, 249 U.S. 454, 39 S.Ct. 316, 63 L. Ed. 704;

Erie R. Co. v. *Purdy*, 185 U.S. 148, 22 S.Ct. 605, 46 L. Ed. 847;

Gasquet v. *Lapeyre*, 242 U.S. 367, S.Ct. 165, 61 L. Ed. 367;

Herndon v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L. Ed. 1530;

People of the State of New York, ex rel. Bryant v. *Zimmerman*, 276 U.S. 63, 49 S.Ct. 61, 73 L. Ed. 184;

Street v. *New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L. Ed 2d 572.

Upon considering conjunctively the aforesaid prevailing rule in the State of Texas and the settled law as established by the aforesaid prior holdings of this forum, it would appear that Petitioners Petition for a Writ of Certiorari should be denied for want of jurisdiction.

Due Process

By giving consideration to the question of due process as it relates to this case, Respondents herein do not intend

to forsake and abandon their position regarding jurisdiction as heretofore presented. Respondents being aware of their fallibility even at their more astute and profound moments realize that what may be irrefutable logic to them regarding the jurisdictional question, may possibly be less than persuasive or cogent to the Court. The Respondents therefore proceed to the issue of due process.

As Respondents understand the position taken by the Petitioners herein, it appears that the Petitioners' basic contention is that due process is not adhered to because Respondents, a governmental body, acquired the land in question from Petitioners for purposes that Petitioners allege were for other than public use. One significant fact that must be taken into account in considering this case is that Respondents herein did not acquire the land in question by the peremptory action of condemnation. The land was conveyed by a deed from Petitioners to Respondents. Respondents herein acquired only one tract of land from the Petitioners which was Tract 5. Petitioners were holdouts and negotiated with Respondents for a longer period of time than any of the other land owners. Petitioners obviously had a choice to make, whether to sell the land to Respondents for the amount of money offered by the Respondents or permit the land to be condemned and then permit the value of the land to be determined under the statutory provisions of condemnation. The Petitioners chose to sell the land directly to Respondents for the amount offered which was in essence the same amount per acre offered for the other tracts of land purchased by Respondents for the school site.

Petitioners state in their Brief (Petitioners' Brief p. 11) that Petitioners were persons of limited sophisticaton and that the attorney declined to explain to them the meaning of the term "condemn" or that it was necessary for them

to seek legal counsel of their own. There was no indication in the record that this is the case and therefore must be refuted. In fact, the record clearly reveals that the attorney for the Respondents, during the negotiations for said land, talked to two qualified attorneys who were representing the Petitioners regarding the purchase of Petitioners' land. In fact, as stated before, (Respondents' Brief p. 4), one of the Petitioner's avowed nescience and naivete regarding the negotiations and the process of condemnation provided grounds for the impeachment of said Petitioner as a witness in the trial of the case. The records indicate that Petitioners were represented by qualified attorneys prior to the time they made the decision to sell the land in question directly to Respondents. The findings of the jury, based upon the testimony of experts during the trial, fully established that Petitioners received the fair market value of the property. (S.F. p. 162, and Judgment of the Trial Court).

Petitioners further state in their Brief (Petitioners' Brief p. 8) that Respondents took Petitioners' land for the purpose of constructing a public school and less than sixty (60) days thereafter conveyed it to one of its officials for his own private use. This statement by the Petitioners in their Brief is completely groundless and the record clearly shows that the conveyance from Petitioners to Respondents occurred approximately eight months before the conveyance of said property to a private individual (S.F. pp. 67, 79). The jury further found that the representation that the land would be condemned for school purposes if it was not voluntarily sold to the Klein Independent School District was not a false statement and therefore not a misrepresentation.

The Petitioners further state in their Brief (Petitioners' Brief p. 8) that the action of Respondents appear more

suspect since they had commenced a course of disposing of the excess property in the same trace prior to the time that the Petitioners' land was acquired. What the Petitioners failed to state in this regard is that the two tracts that were disposed of by Respondents prior to the purchase of Tract 5 were Tracts 3 and 4, which were separated from the remainder of the tracts by Tract 5. Tract 5, the only tract purchased from Petitioners herein, was immediately contiguous to the Tracts 6 through 12 which the Respondents had decided to retain title to. At the time of the actual conveyance of said land from Petitioners to Respondents, Respondents had made the decision to devote Tract 5 to the use of a teacherage, which is fully authorized by the Laws of the State of Texas as a public use (S.F. p. 54) Article 2797, Tex. V.A.C.S. Petitioners then proceed to make the conclusion that Petitioners' land was not required for any public use at the date of its acquisition, and then adds "indeed the jury so found" (Petitioners' Brief p. 9). This is clearly not reflected in the findings of the jury. The jury only found that at the time of the conveyance of Tract 5, the land in question, it was not the intention of the school district to use said land for school purposes. (See Judgment, Special Issue No. 13). Petitioners thereby are evidently endeavoring to foist upon the Court the proposition that the term "school purposes" as applied in the trial court is synonymous with "public use" as stated before in this Brief. In this case now before the Court, the phrase "school purposes" is certainly susceptible of at least two definitions. A reasonable definition of "school purposes" could exclude provisions for a teacherage in the purchase of land, especially in the light of the testimony of Mr. Lyon that the land in question at the time of purchase was acquired for a teacherage (S.F. p. 54), and the interrogations during the trial with reference to whether the land was acquired to build a school (S.F. pp. 10, 57, 76). The Re-

spondents' intention, at the time of making the representations to Petitioners was to use the land in question for school purposes. The evidence certainly indicates that, at the time of the conveyance of the land in question, from Petitioners to Respondents it was to be used for the purpose of a teacherage. As the jury found that there were no misrepresentations by the Respondents to the Petitioners at the time of their negotiations, it is also reasonable to conclude that the Respondents, some months later at the time of their conveyance of the land in question, had modified their plans for the use of such land. Even if the Appellate Court had considered the due process question, which was not properly before the Appellate Court, the Appellate Court of Texas would have been bound to uphold the judgment of the Trial Court in accordance with the holdings of the case decided by Supreme Court of Texas where the question of an undefined term was considered by the Court:

> *Little Rock Furniture Manufacturing Co.* v. *Dunn*, 222 S.W.2d, 985 (Sup. Ct.).

In the *Little Rock* case above cited, the jury in one Special Issue found that a party had failed to keep a proper lookout, and subsequently found in another Special Issue that such failure to keep a proper lookout by the party did not constitute negligence.

The complicating fact in this case was that the Court, in its instruction had given a definition of "proper lookout" that made the failure to keep such a "lookout" negligence per se. The Supreme Court in its Opinion stated:

> "A different situation would be presented if the Court had not defined 'proper lookout' in such a way that a finding of failure to keep a proper lookout is necessarily negligent."

The Court went on to say:

> "In such cases, we might be free to apply the recognized rule that Courts properly refuse to strike down the answers on the grounds of conflict if there is any reasonable basis upon which they may be reconciled."

As there was no definition of "school purposes" in the Court's charge that would have included all lawful purposes for which the school district may purchase land, and as there was no finding of the jury that the land in question was purchased for other than public use, the Court would have been obligated to uphold the judgment of the Trial Court. The Petitioners had not requested such a definition nor an issue on public use. As the term "school purposes" used in the charge of the Trial Court could reasonably carry two or more meanings or definitions, and as there was no definition of such term in the charge and none requested by the Plaintiffs, the Appellate Court, under the Little Rock holding would have been bound to apply the definition or meaning that would uphold the Trial Court's Judgment. We do not know if this rule was applied in this case as the Appellate Court chose other grounds for upholding the Trial Court's decision, but it is apparent under these circumstances, that Petitioners' contention that the definition that would have struck down the judgment of the Trial Court and possibly given a basis for interjecting due process is not well taken. At this point Respondents reiterate — the question of due process was never properly before any State Court in this case. Petitioners state in their Brief (Petitioners' Brief p. 9) that the Texas Court of Civil Appeals had reasoned that it is not bound by prior decisions of the United States Supreme Court with respect to due process requirements for the taking of private property, since under rules peculiar to Texas only, the Petitioners are required to do and perform certain acts such

as tendering the return of any consideration received before they can prevail in any action to cancel a coveyance of land put to public use. There is nothing in the Opinion of the Texas Court of Civil Appeals, that in anyway indicates that this is the reasoning of the Texas Court of Civil Appeals. The Texas Court of Civil Appeals having not considered any Constitutional questions or Federal questions as they were not properly before the Court, refused to grant the relief sought by Petitioners in said Appellate Court in accordance with their pleadings in the Trial Court. This decision was based upon the fact that Petitioners had not performed a condition precedent in maintaining an action for rescission. This condition precedent was the tendering of the return of the consideration received. Petitioners then move on to make the same allegation regarding the Respondents by stating that the premise of the Respondents is that in their proceedings to acquire the Petitioners' real estate, they were not bound by prior holdings of the Supreme Court of the United States with respect to due process. Respondents are fully aware that they are bound by prior holdings of this Honorable Court with respect to due process and at no time, in any proceedings involved in this case, tried to establish a premise that would state otherwise. Petitioners on page 13 of their Brief concede that under existing Texas Law, Respondents would be empowered to acquire real estate for the purpose of carrying on the business of free public education and for the construction of a teacherage. Immediately after making this concession, the Petitioners then state that the land in question, which was purchased from the Petitioners, was used for neither purpose, nor was it intended to be used for either purpose. There is no question that the land was used for neither purpose but the conclusion made by Petitioners that it was not intended to be used for either purpose has no basis whatsoever in the evidence or in the findings of

the jury in the Trial Court. This is merely a conclusion of the Petitioners. Petitioners then proceeded to state that Respondents, on the same page of their Brief (Petitioners' Brief p. 13) have admitted the wrongful acquisition of the land and pleaded their own wrongful act in the defense by stating that the record is silent as to an offer to restore the consideration. Respondents have to catagorically deny that they at any time admitted that there has been a wrongful acquisition of the land in question. They only stated in their Brief to the Court of Civil Appeals, that Petitioners had failed to prove one of the essential elements to maintaining an action for rescission of a deed in that they failed to make a tender or offer of returning the consideration they received for the land conveyed. Quite often school districts acquire land that they later must dispose of due to exigencies or contingences not anticipated, even though the land was never used for the proposed purpose or purposes while title was in the school district. This, of itself, does not constitute taking of private property by a political subdivision for private use.

The Petitioners repeat a statement previously made, and passed upon heretofore by referring to the question of undue influence and coercion and then state: "misinformation pervaded the case." (Petitioners' Brief p. 14). This statement is made without any reference or basis to the statement of facts. As stated before, the Petitioners in this case had consulted qualified attorneys about the matter, had stubbornly and effectively bargained with Respondents herein regarding the conveyance of the land in question. There is also testimony which was not controverted or refuted that Mr. Klein, the attorney for the Respondents at the time, negotiated with two attorneys representing the Appellants (S.F. pp. 170-171). Petitioners in their Brief (Petitioners' Brief p. 14) further state that the Board

received Petitioners' land as surplus and unnecessary to its lawful purposes. The Petitioners in their Brief (Petitioners' Brief p. 13), admit that the acquiring of land for a teacherage is an authorized and lawful purpose for acquiring land, yet here they state that at the time that the land was received by Respondents it was surplus and unnecessary for its lawful purposes, without any grounds in the record or in the findings of the Court.

Petitioners charge that this particular transaction is not an instance of a taking of land where resale is authorized when and if the property is determined no longer necessary for public use, Citing *Davis* v. *City of Lubbock*, 326 S.W. 2d 699 (Tex. Sup. Ct., 1959). Then proceed to conclude with the statement: "but is the very different case of a taking of land with contemporaneous knowledge and purpose that a definite and separate part is not necessary for public use." It has never been established in the Trial Court or set forth by testimony before the Trial Court that Respondents had contemporaneous knowledge and purpose that a definite and separate part of the land in question was not necessary for public use at the time of the acquisition of said land by conveyance, or that Respondents had the intent to devote the land in any way to private use, or to a use other than public. Respondents readily agree that there can be no valid argument for governmental bodies acquiring property for private use. This has not been established in this instance. Although the Respondents, Klein Independent School District, purchased Tract 5 from the Petitioners and approximately eight months later sold this property to a private individual, this does not, of itself, sustain the contention that said property was taken for private use. There is testimony in the record that at the time of the actual conveyance of Tract 5, on September 8, 1962, Klein Independent School District had the expressed intention

of constructing a teacherage on Tract 5. (S.F. p. 54). The purchase of real property for a teacherage as stated before is specifically authorized under Statute of the State of Texas, Article 2797 Tex. V.A.C.S. See also:

Landrum et al v. *Centennial Rural High School District, et al,* 146 S.W. 2d 799 (Civ. App.); and

Adams v. *Miles, et al,* 300 S.W. 221 (Civ. App.) 41 S.W. 2d 21 (Com. App.).

One should not lose sight of the fact that negotiations for the acquisition of the total tract of land for the construction of schools, for school grounds, and drawing of architectural plans and specifications were being conducted for a period of approximately two years prior to the purchase of Tract 5, the land in question. Changes regarding some of the facets of such a program are almost inevitable. Just about all such large building programs are subject to modification up to the time they are in the incipent states of construction. Not only is the buying of land by an independent school district provided for by statute but so is the selling of land. Article 2773 Tex. V.A.C.S. All the land sold by Respondents in this case was sold as soon as possible by Respondents upon determining they would have no use for such property. The land sold by the Respondents was sold for exactly the same sum of money for which it was purchased as stated before in this Brief. (S.F. pp. 79, 80). For an independent school district to acquire land and hold such land for an extended period of time may carry implications that the land is bought for speculation. There is nothing presented in this case except the conjecture and speculation of Petitioners that will uphold the charge that the acquisition of the property in question was for unlawful purposes.

Another glaring misstatement of Petitioners is the assertion that Mr. Lyon was the Superintendent of the School Board (Petitioners' Brief, p. 15). Mr. Lyon had no position on the School Board. He was not a member of the Board and could not and did not vote on any issue presented to the School Board. He was a salaried employee of the School District. (S.F., p. 46).

Most of the cases cited by Petitioners in their brief are dealing with condemnation proceeding and are actually not relevant to this case.

Courts and judicial authorities obviously have not been able to give the term, "due process of law", a precise and comprehensive definition. It is a term that appears to be beyond a conotative definition and at best must be defined denotatively in its varied applications. In the abstract it is a nebulous and obfuscating term but seems often to become vividly clear and exact in the particular: In this particular case the following definition seems appropriate. "Due process of law in each particular case means such an exertion of all the powers of government as the settled maxims of law permit and sanction and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which one in question belongs. *Dukich* v. *Blair,* et al, 3 F. 2d 302.

Respondents respectfully submit to the Court with this definition of due process of law, (or any other for that matter of responsible derivation) applied to the facts of this case, that Petitioners were not denied due process of law in this case.

CONCLUSION

Upon considering the foregoing statements, questions and arguments, Respondents request that the Petition for the Writ of Certiorari be not granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES S. KELLY, do certify that on the 21st day of Sept., 1971, a true and correct copy of the foregoing Brief On Writ of Certiorari was mailed to the Attorney for the Petitioners, Clarke Gable Ward, 2100 First National Life Building, 806 Main Street, Houston, Texas 77002, by United States Certified Mail, Return Receipt Requested.

I further certify, in accordance to Rule 33 of the Rules of the Supreme Court of the United States, that all parties required to be served have been served.

James A Kelly
JAMES S. KELLY